RECORD AND BRIEF

No. 16-341

Supreme Court, U.S.
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In The

Supreme Court of the United States

TC HEARTLAND LLC,

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* 32 INTERNET COMPANIES, RETAILERS, AND ASSOCIATIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE**

Amici Curiae ("*Amici*") – 26 companies and 6 associations – submit this brief in support of the petition for a writ of certiorari because venue in patent cases matters, and indeed, matters a lot.

Amici companies are: Acushnet Company; Adobe Systems Inc.; ASUS Computer International; Crutchfield Corporation; FedEx Corporation; Garmin International, Inc.; HP Inc.; HTC America, Inc.; IAC/InterActiveCorp; KAYAK Software Corporation; L Brands, Inc.; Lecorpio, LLC; Macy's, Inc.; Newegg Inc.; Oracle Corporation; Overstock.com, Inc.; QVC, Inc.; Parke-Bell, Ltd.; Pegasystems Inc.; Red Hat, Inc.; SAS Institute Inc.; SAP America, Inc.; SteelSeries North America Corporation; Symmetry LLC; VIZIO, Inc.; and Xilinx, Inc.

Amici associations are: BSA | The Software Alliance (which represents the global software industry before governments and in the international marketplace); Computer and Communications Industry Association (which represents a wide range of companies in the computer, Internet, information technology, and

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* Pursuant to S. Ct. R. 37.6, counsel for *Amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to S. Ct. R. 37.2(a), counsel for *Amici* represent that all parties were provided notice of *Amici*'s intention to file this brief at least 10 days before its due date. Both parties consent to the filing of this brief, and copies of their consent are being filed with this brief.

telecommunications industries); Entertainment Software Association (which represents nearly all major U.S. publishers of computer and video games); the Internet Association (which consists of 40 of the world's leading Internet companies); North Carolina Chamber (which is North Carolina's largest, broad-based business advocacy organization with over 35,000 members); and North Carolina Technology Association (which has over 750 members and focuses on advancing North Carolina's tech industry).

Amici represent a broad swath of the American economy. Some are long established companies, while others are start-ups. Some have brick-and-mortar stores located across the country, while others have only an Internet presence. Some sell products that they manufacture, while others sell services or software.

All *Amici*, however, share at least one thing in common – they or their members have been sued, repeatedly, for patent infringement in one of the handful of districts that hear the vast majority of all patent cases. These districts are almost always located hundreds or thousands of miles from the corporate headquarters of *Amici* and equally far from the business activities accused of infringement. Venue is often based on no more than allegations that *Amici* do business in the district by placing a small percentage of their allegedly infringing products into the stream of commerce that end up in the district, or that their allegedly infringing websites can be viewed by individuals in the district. In other words, under current

Federal Circuit caselaw and the realities of modern e-commerce, *Amici* can be sued in virtually any district in the country and they are sued invariably in an inconvenient district preferred by plaintiffs. *Amici* have a concrete interest in the question whether there is *any* limitation on venue in patent cases under 28 U.S.C. § 1400(b).

SUMMARY OF ARGUMENT

Amici urge the Court to grant the petition for a writ of certiorari because venue is one of the critical issues that can determine the outcome of a patent lawsuit. This petition provides a unique opportunity for the Court to review the Federal Circuit's misreading of the patent venue statute that has led to pervasive forum shopping with the unintended and undesirable concentration of most patent litigation in a handful of judicial districts.

In the nineteenth century, Congress passed a statute to restrict venue in patent cases, 28 U.S.C. § 1400(b), in order to correct the abuses under the general venue statute that allowed alleged infringers to be sued almost anywhere. This Court repeatedly interpreted the statute narrowly, but has not considered the statute since the Nixon Administration. More recently, the Federal Circuit has concluded that venue in patent cases is synonymous with personal jurisdiction. Combined with its embrace of an expansive theory of personal jurisdiction, the Federal Circuit effectively has

held that venue over an alleged corporate infringer is proper in almost any district in the country. Stated differently, the statute that was passed to restrict venue in patent cases has now been interpreted to allow more expansive venue over corporations in patent cases than in non-patent cases.

Extensive statistical evidence and academic research demonstrate that the Federal Circuit's approach has resulted in rampant forum shopping. By 2001, 29% of all patent cases were filed in only five of the 94 districts, and 44% of all patent cases were filed in 10 districts. Since that time, forum shopping has dramatically accelerated. Between 2007 and 2015, 52% of all patent cases were filed in only five districts, and 66% of all patent cases were filed in 10 districts. In the first half of 2015, 52% of all patent cases were filed in only two districts, the Eastern District of Texas and the District of Delaware, the district in which this case arose. In 2015, a single judge in the Eastern District of Texas handled one-third of all patent cases nationwide. Recent studies have concluded that the most popular patent districts compete to adopt procedures that will – and do – attract plaintiffs to their districts.

Choice of forum plays a critical role in the outcome of patent litigation. Generally in federal litigation, plaintiffs' chances of winning drop from 58% in cases in which there is no transfer to 29% in transferred litigation. In patent cases, the patent holder wins more often than not when it selects the forum of an infringement action, and the alleged infringer wins more often

than not when it selects the forum by filing a declaratory judgment action. In the most popular patent district, the Eastern District of Texas, the patent holder wins 72% of all jury trials. In the districts that hear the most patent cases, courts are more reluctant to transfer cases, and more reluctant to grant summary judgment, ratcheting up the pressure to settle even weak patent cases in the face of extended, expensive litigation. If plaintiffs can sue alleged corporate infringers in any district in the country, it only stands to reason that they will choose to do so in the handful of districts where they are most likely to prevail or to extract a settlement.

Forum shopping harms the legal system by creating inequities in which plaintiffs often can make an outcome-determinative choice by selecting venue, and by causing inefficiencies in which cases are litigated far from the location of the parties, the alleged infringement, and the evidence. Justice cannot be administered blindly and fairly if one of the parties can engage in forum shopping in order to gain an advantage.

This petition presents a rare opportunity for the Court to address the important issue of forum shopping resulting from the Federal Circuit's failure to impose any real limitations on venue. Although defendants can move to transfer venue, such motions are committed to the discretion of the district court. Defendants rarely, if ever, challenge denial of motions to transfer after entry of final judgment (and obviously cannot appeal if they settle when faced with litigating

in a distant district). Instead, on occasion, defendants will challenge the denial of a motion to transfer by filing a mandamus petition like the Petitioner in this case. However, mandamus petitions concerning venue are denied nearly 70% of the time by the Federal Circuit. Before 2008, the Federal Circuit had never granted a mandamus petition to overturn a decision denying transfer, and since that time, it has only granted a handful of such mandamus petitions (usually involving the Eastern District of Texas). Thus, although venue determinations are critically important, the propriety of venue decisions is rarely subject to appellate scrutiny. Accordingly, this petition presents the best opportunity in a generation for the Court to determine the proper scope of 28 U.S.C. § 1400(b).

ARGUMENT

THE COURT SHOULD GRANT THIS CERTIORARI PETITION TO INTERPRET THE PATENT VENUE STATUTE BECAUSE THIS ISSUE IS IMPORTANT AND THIS CASE PRESENTS A UNIQUE OPPORTUNITY TO STOP FORUM SHOPPING.

Congress Enacted A Restrictive Patent Venue Statute. This petition concerns the scope of the special patent venue statute, 28 U.S.C. § 1400(b): "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of

infringement and has a regular and established place of business." In 1897, "Congress adopted the predecessor to § 1400(b) as a special venue statute in patent infringement actions to eliminate the 'abuses engendered' by previous venue provisions allowing such suits to be brought in any district in which the defendant could be served." *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 (1961) (quoting *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942)). The patent venue statute "was designed 'to define the exact jurisdiction of the . . . courts in these matters,' and not to 'dovetail with the general [venue] provisions.'" *Schnell*, 365 U.S. at 262 (ellipsis and brackets added by Court and quoting *Stonite*, 315 U.S. at 565-66).

"As late as 1957 we have held § 1400(b) to be 'the sole and exclusive provision controlling venue in patent infringements actions.'" *Schnell*, 365 U.S. at 262 (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957)). In *Fourco*, the Court held that "28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)." *Fourco*, 353 U.S. at 229. There, the Court held that a corporation "resides" where it is incorporated. *See id.* at 226.

In its last word on this subject in 1972, the Court concluded that 28 U.S.C. § 1391(d), and not 28 U.S.C. § 1400(b), dictated the venue of a patent infringement lawsuit against a foreign corporation that does not "reside" in any district, but noted its prior cases had

concluded that for domestic corporations, "Congress placed patent infringement cases in a class by themselves, outside the scope of general venue legislation." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 713 (1972). The Court has not revisited the scope of Section 1400(b) since *Brunette*.

The Federal Circuit Eliminated The Limitations Of The Patent Venue Statute. Although this Court held that Section 1400(b) should be interpreted strictly according to its plain meaning without supplementation by Section 1391(c), *see Fourco*, 353 U.S. at 229, in 1990 the Federal Circuit nevertheless concluded that Congress changed "the long-standing interpretation of the patent venue statute," 28 U.S.C. § 1400(b), when it amended the definition of "resides" in 28 U.S.C. § 1391(c) in 1988. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1575 (Fed. Cir. 1990), *cert. denied*, 499 U.S. 922 (1991). Applying that amended definition, the court concluded that "[n]ow, under amended § 1391(c) as we here apply it, venue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced." *Id.* at 1583. In other words, the Federal Circuit concluded that the patent venue statute enacted to restrict venue in patent cases no longer imposed *any* additional restrictions on venue for corporations. *See also* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79

N.C. L. Rev. 889, 897 (2001) (*VE Holding* "rendered superfluous the patent venue statute for corporate defendants").

The Federal Circuit likewise has adopted an expansive view of personal jurisdiction, a view that may be more expansive than that adopted by this Court today:

> Despite the Supreme Court's recent decisions questioning the "stream of commerce" theory of personal jurisdiction in product liability cases, the Federal Circuit has held that jurisdiction is proper if the accused products are sold in the forum state, whether those sales are made directly by the alleged infringer or through established distribution networks. Because most accused infringers are corporations whose products are sold nationwide, most patent plaintiffs can sue in any district.

Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 248 (2016) (footnotes omitted); *compare J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), *with Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994); *see also In re Heartland LLC*, 821 F.3d 1138, 1343-45 (Fed. Cir. 2016) (rejecting argument that *Walden v. Fiore*, 134 S. Ct. 115, 121 n.6 (2014), overruled or limited Federal Circuit's specific jurisdiction jurisprudence).

"Due to weak personal jurisdiction and venue constraints, a patentee can usually 'choose to initiate a lawsuit in virtually any federal district court.'" Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 247 (quoting

Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444, 1451 (2010); *see also* Moore, *supra*, 79 N.C. L. Rev. at 901 ("With borderless commerce the norm and with lax jurisdiction and venue requirements, plaintiffs in patent cases have an unfettered choice of where to bring suit."). The problems that arise from conflating the venue and personal jurisdiction determinations are exacerbated in e-commerce patent actions accusing a feature of a website of infringement when the website is operated by the defendant from its distant corporate headquarters and merely is available to viewers in the district (along with anyone else anywhere in the world).

Eliminating Patent Venue Limitations Caused Extensive Forum Shopping. Not surprisingly, eliminating the restrictions in the patent venue statute resulted in rampant forum shopping in which a handful of districts perceived to be plaintiff-friendly now handle the vast majority of patent lawsuits. This phenomenon is so pronounced today that academics refer to it as "forum selling" or "forum competition" in which districts compete to attract plaintiffs to file patent lawsuits in their courts. *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241 (2016); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Pa. L. Rev. 631 (2015); *cf.* Tyler4Tech, *IP Friendly* (local businesses competing for patent cases, claiming E.D. Tex. is "a popular venue for patent cases due to its judicial expertise, *plaintiff-friendly local rules*, speedy dispositions, and principled jurors who understand

the value of Intellectual Property") (emphasis added) (available at http://tyler4tech.com/ipfriendly.html).

In 2001, then-Professor, now-Judge, Moore conducted the first major empirical study of forum shopping in patent cases following the Federal Circuit's elimination of any limitations over venue for corporations. Examining over 10,000 patent cases resolved between 1995 and 1999, she concluded that 29% of all patent cases were filed in only five of the 94 districts, and 44% of all patent cases were filed in only 10 districts. *See* Moore, *supra*, 79 N.C. L. Rev. at 902-904. Notably, the district that currently handles over 40% of all patent cases, the Eastern District of Texas, did not even appear in the list of the 10 busiest districts in Professor Moore's study. *See id.* at 903. Furthermore, Professor Moore discussed the Federal Circuit's interpretation of the patent venue statute and concluded that "[t]he prevalence of forum shopping is a direct by-product of the existing statutory framework." *Id.* at 892.

Since that time, forum shopping in patent cases has become markedly worse. Between 2007 and 2015, 52% of all patent cases were filed in only five districts, and 66% of all patent cases were filed in only 10 districts. *See* Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 249. By 2013, nearly half of all patent cases were filed in only two districts (the Eastern District of Texas and the District of Delaware, the district in which this case arose), neither of which are technology or population centers, and in both districts, patent cases constituted a disproportionate share of each district's civil docket.

See Anderson, *supra*, 163 U. Pa. L. Rev. at 632-33 (28% of civil docket in E.D. Tex. and 56% in D. Del.). Although Delaware is the state of incorporation for many companies, including some of the *Amici*, which thus "reside" in Delaware under the patent venue statute as interpreted by this Court, *see Fourco*, 353 U.S. at 326, for many other companies, Delaware is simply yet another faraway venue. *Cf. In re Heartland LLC*, 821 F.3d at 1340 (Petitioner is Indiana limited liability company).

These statistics actually understate the concentration because patent assertion entities, *i.e.*, patent trolls, have no "home court" and thus are more likely to file suit in the districts perceived to be the most plaintiff-friendly; and when these entities do file suit, they are more likely to sue multiple defendants in a single lawsuit (or, more recently, file multiple lawsuits under the same patent, which are then consolidated for pre-trial purposes). *See* Greg Reilly, *Aggregating Defendants*, 41 Fla. St. U. L. Rev. 1011, 1024 (2014) (twice as many defendants sued per case in E.D. Tex. than national average); Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 249 (in 2010, 10% of the patent cases were filed in E.D. Tex., but 25% of all patent defendants were sued there). "In 2007, about 20 percent of all patent infringement defendants were named in cases filed in the Eastern District of Texas, and this percentage increased to almost 50 percent in 2015." GAO Report, *Patent Office Should Define Quality, Reassess Incentives and Improve Clarity*, 16 (June 2016).

In the first half of 2015, 52% of all patent cases were filed in only two districts, the Eastern District of Texas and the District of Delaware, and 76% of all patent cases were filed in only 10 districts. *See* Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 249. In 2015, a single judge in the Eastern District of Texas had 1,686 patent cases assigned to his docket, *i.e.*, one-third of all patent cases nationwide. *See* Professors' Letter Supporting Venue Reform, at 1 (July 12, 2016) (available at http://patentlyo.com/patent/2016/07/professors-patent-reform.html); *see also* Frederick L. Cottrell III, *et al.*, *Nonpracticing Entities Come to Delaware*, Federal Lawyer, 63 (Oct. 2013) (each judge in D. Del. has 400-500 patent cases).

Because the Federal Circuit eliminated restrictions on venue over corporations in the patent venue statute, districts can – and do – compete to attract plaintiffs to file patent lawsuits in their districts. *See* Anderson, *supra*, 163 U. Pa. L. Rev. at 635 ("maintaining trial management practices in a predictable manner that favors a particular type of litigant (almost always plaintiffs) allows district courts to compete for the business of litigation"); Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 243 (judges in E.D. Tex. "have sought to attract patent plaintiffs to their district and have distorted the rules and practices relating to case assignment, joinder, discovery, transfer, and summary judgment in a pro-patentee (plaintiff) direction"); Cottrell, *supra*, Federal Lawyer at 64 (D. Del. is the second most favorable jurisdiction for patent plaintiffs based on case management approach). In a world in which a

patent holder can file a patent case in virtually any district, it stands to reason that such cases would be filed in the most hospitable districts to plaintiffs.

Forum Shopping Undermines Justice And The Appearance of Justice. "Venue is worth fighting over because outcome often turns on forum." Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evils of Forum Shopping*, 80 Cornell L. Rev. 1507, 1508 (1995). In their groundbreaking study of over 2.8 million federal civil lawsuits, Professors Clermont and Eisenberg found that plaintiffs' chances of winning drop from 58% in cases in which there is no transfer to 29% in transferred litigation. *Id.* at 1512. In her study of over 10,000 patent cases, Professor Moore found that the patent holder wins 58% of the time when it selects the forum, but wins only 44% of the time in a declaratory judgment action when the alleged infringer selects the forum. *See* Moore, *supra*, 79 N.C. L. Rev. at 921.

Forum shopping has an even greater impact when cases go to trial. In the most popular patent district, the Eastern District of Texas, the patent holder wins 72% of all jury trials. *See* Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 254. "Perhaps nothing increases the patentee's chances of a favorable resolution more than making it to trial." *Id.* at 251. It is not surprising, then, that plaintiffs select venues that favor trial over summary judgment:

> [J]udges in the Eastern District of Texas grant summary judgment at less than one-quarter

> the rate of judges in other districts. Only Delaware even approaches the Eastern District of Texas, and its summary judgment rate is twice that of the Eastern District of Texas.

Id. (brackets added); *see also* Anderson, *supra*, 163 U. Pa. L. Rev. at 655 (judges in D. Del. "grant summary judgment motions rarely") (footnote omitted).

Similarly, "[m]otions to stay pending reexamination are granted over half the time nationwide, but are granted only about one-third of the time in the Eastern District of Texas." Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 264 (footnotes omitted). "Perhaps deterred by this low success rate, fewer stay motions were made in the Eastern District (1% of total 2013-2014 case filings) than in the District of Delaware (2.2%), . . . [and] Northern District of California (11%)." *Id.* (ellipsis and brackets added). "As a result, the Eastern District's stay rate in 2013-2014 was only 0.4% of filed cases, significantly lower than districts like the District of Delaware (1.3%) and Northern District of California (6.5%)." *Id.* (footnote omitted).

The *prospect* of trial may be enough for a patentee to obtain a favorable resolution through settlement. *See* Anderson, *supra*, 163 U. Pa. L. Rev. at 655-56 ("The infrequency of obtaining summary judgment increases costs for defendants, increases the odds of getting to trial, and incentivizes defendants to settle out of fear of potentially large damage awards.") (footnote omitted); *accord* Cottrell, *supra*, Federal Lawyer at 64. Beyond the risk of loss at trial in a plaintiff-friendly

forum is the enormous cost of discovery and litigation in a far-off venue:

> By bringing suit in far-flung, perceivably-plaintiff-friendly "magnet jurisdictions," nuisance plaintiffs can satisfy the minimum Constitutional venue requirements while subjecting defendants to the cost and inconvenience of having to litigate in a distant location.

Ranganath Sudarshan, *Nuisance-Value Patent Suits: An Economic Model and Proposal*, 25 Santa Clara High Tech. L.J. 159, 165 (2008) (footnote omitted); *see also id.* at 172 ("Perhaps the greatest factor contributing to the existence of nuisance-value patent suits is the high cost of patent litigation."). If plaintiffs have unfettered discretion to sue corporations in almost any district in the country, they are much more likely to prevail or to extract a favorable settlement.

Suffice it to say, commentators condemn forum shopping in patent litigation. "Forum shopping can be harmful to the legal system by distorting the substantive law, by showcasing the inequities of granting plaintiffs an often outcome-determinative choice among many district courts, and by causing numerous economic inefficiencies, including inconveniences to the parties." Fromer, *supra*, 85 N.Y.U. L. Rev. at 1445. In addition to its adverse effect on justice, forum shopping adversely affects the appearance of justice: "Forum shopping conjures negative images of a manipulable legal system in which justice is not imparted fairly or predictably." Moore, *supra*, 79 N.C. L. Rev. at

892; *see also id.* at 924-30 (discussing the "evils" of forum shopping, namely, inequity and inefficiency).

"Forum shopping has fundamentally altered the landscape of patent litigation in ways detrimental to the patent system as a whole." Anderson, *supra*, 163 U. Pa. L. Rev. at 637 (footnote omitted). "Court competition creates even more problems, ranging from reduced trust in the judicial process to uneven playing fields for litigants." *Id.* By reviving the currently moribund patent venue statute in accord with its express language and original intent, the Court could restore trust in the judicial process and reinstate a level playing field.

This Petition Presents A Rare Opportunity To Stop Patent Forum Shopping. This petition presents an unusual opportunity for the Court to correct the Federal Circuit's failure to impose any real limitations on venue in patent cases through its abandonment of the restrictions set out in the patent venue statute. The Court has not considered that statute, 28 U.S.C. § 1400(b), since 1972, and has not construed its scope over corporations since 1957. *See Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957). The Court has not had occasion to consider the Federal Circuit's effective nullification of the patent venue statute since it denied certiorari in *VE Holding Corp. v. Johnson Gas Appliance Co.*, 499 U.S. 922 (1991). The Court now has 25 years of empirical evidence of forum shopping that resulted from the Federal Circuit's decision in *VE Holding* to treat Section 1400(b) as superfluous.

Contrary to other cases, this Court's silence is not evidence that the Federal Circuit correctly interpreted Section 1400(b) a generation ago. With its unique, subject matter-specific jurisdiction, only the Federal Circuit has occasion to interpret the scope of the patent venue statute, and it has steadfastly followed its holding in *VE Holding*. Although corporate defendants still could move to dismiss for improper venue, such motions are futile under controlling Federal Circuit caselaw, and thus, this outcome cannot be overturned unless and until this Court resuscitates Section 1400(b). Especially because the impact of the flagrant forum shopping included a dramatic increase in cost-of-defense settlements with defendants anxious to avoid the exorbitant cost of patent litigation in an unfriendly forum, the likelihood of any defendant pursuing the issue of proper venue under Section 1400(b) was – and is – remote.

Although defendants can move to transfer venue pursuant to 28 U.S.C. § 1404(a), such motions are committed to the discretion of the district court. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988). Defendants rarely, if ever, challenge venue or denial of motions to transfer venue after entry of final judgment in patent cases (and obviously cannot appeal if they settle instead of incurring the enormous cost and risk of litigating in a hostile or remote district). Rather, on occasion, defendants will challenge the denial of a motion to transfer by filing a mandamus petition to the

Federal Circuit. Proper venue, therefore, arises on appeal, if at all, only in mandamus petitions to the Federal Circuit.

Stated differently, the fact that this petition arises from an unsuccessful mandamus petition concerning venue to the Federal Circuit, as opposed to an appeal after a final judgment, means this petition is not an outlier that can be rejected while the Court awaits a better candidate later. Also, because this petition concerns the purely legal question of the proper scope of the patent venue statute, the higher standards applicable to Federal Circuit mandamus decisions is immaterial to the resolution of that question. *Cf. In re Heartland LLC*, 821 F.3d at 1341 (mandamus standard).

To be clear, motions to transfer venue under Section 1404(a), and then mandamus petitions to the Federal Circuit from denial of those motions to transfer venue, are not an adequate substitute for the proper interpretation of Section 1400(b). "[T]he most popular current destinations for patent plaintiffs – the Eastern District of Texas and the District of Delaware – both have reputations as districts that are unlikely to grant transfer motions." Anderson, *supra*, 163 U. Pa. L. Rev. at 676 (footnote omitted).

Additionally, courts are slow to act on motions to transfer. *See* Professors' Letter Supporting Venue Reform, *supra*, at 2 ("The average grant of transfer in [E.D. Tex.] took over a year (490 days), and the average denial of a transfer motion took 340 days, meaning

that even cases that are ultimately transferred remain pending in the district for nearly a year.") (brackets added and footnote omitted). Because motions to transfer (and motions to dismiss, for that matter) do not automatically stay discovery or litigation, defendants routinely settle their cases to avoid the high cost of patent litigation rather than wait a year or more for a ruling on even meritorious motions to transfer or dismiss. *Cf.* Klerman & Reilly, *supra*, 89 S. Cal. L. Rev. at 268-70 (onerous, asymmetrical, discovery requirements imposed on defendants in E.D. Tex.).

If the motion to transfer venue is denied, the Federal Circuit is unlikely to overturn that decision in a mandamus petition. Overall, the Federal Circuit grants only about 10% of the mandamus petitions it considers. *See* Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 Indiana L. Rev. 343, 345-46 (2012). Before 2008, the Federal Circuit had never granted a mandamus petition to overturn a decision denying transfer. *See* Anderson, *supra*, 163 U. Pa. L. Rev. at 676. Following *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008), the Federal Circuit found that the district court (usually the Eastern District of Texas) had clearly abused its discretion in denying a motion to transfer in only 11 cases by 2012, *see* Gugliuzza, *supra*, at 346 (footnote omitted), and since 2012, the Federal Circuit has only granted five such petitions (and none in the last two years). *See In re TOA Techs., Inc.*, 543 Fed. Appx. 1006 (Fed. Cir. 2013); *In re Toyota Motor Corp.*, 747 F.3d 1338 (Fed. Cir. 2014); *In re WMS Gaming Inc.*, 564 Fed. Appx. 579 (Fed. Cir. 2014);

In re Nintendo of Am., 756 F.3d 1363 (Fed. Cir. 2014); *In re Apple, Inc.*, 581 Fed. Appx. 886 (Fed. Cir. 2014). The Federal Circuit has only granted 17 of 54 (31%) of the mandamus petitions concerning denial of venue since 2008. In other words, motions to transfer are decided slowly, if at all; when they are decided, they are usually denied; and in the minority of cases in which the denials of the motions to transfer are challenged in the Federal Circuit, those mandamus petitions are usually denied. Suffice it to say, motions to transfer – vested in the discretion of the trial court – will never be an adequate substitute for a proper application of the patent venue statute, 28 U.S.C. § 1400(b), which was enacted to limit jurisdiction in patent cases. The Federal Circuit's decision to conflate venue with personal jurisdiction should be reviewed by this Court *now* because this petition squarely presents this important, indeed often outcome-determinative, purely legal issue.

The patent venue statute resembles an ancient Mayan city – once a vibrant and imposing structure, it was abandoned years ago, and it now is unrecognizable and crumbling under the weight of the steadily encroaching jungle. The Court should grant the petition to restore the patent venue statute to its former stature, and put a stop to forum shopping in patent cases.

CONCLUSION

Amici Curiae respectfully submit that the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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